IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

Criminal Appeal no. 307 of 2007

Shri Yusuf Tayyab Jummani ....Petitioner
vs.
Dilwar Sattar Memon & anr. .....Respondents

Mr. A.G. Shaikh, Advocate for Petitioner
Mr. U.V. Nikam APP for Respondent no.2

Coram:- J.H. BHATIA, J
18th April, 2007.

P.C.

Heard Mr. A.G. Shaikh learned Counsel for the applicant. Inspite of service none is present for the Respondent no. 1, who is original accused. Perused the record.

2. Record reveals that the applicant is original Complainant. He had filed a complaint under section 138 of Negotiable Instrument Act against Respondent no. 1 and it was registered as Summary Criminal case no. 30/2000 before JMFC, Jawahar. On number of occassions the Respondents remained absent and arrest warrant was issued against him. On 29-12-2003 the Complainant was absent because he was out of station and, therefore, the application for exemption and adjournment was made. Without passing any order on that application the learned

Magistrate noted below the complaint exhibit 1 that the Complainant was absent and put up the matter for order on 1-1-2004. On 1-1-2004 an application exhibit 28 was made on behalf of the Complainant that due to death of a close relative on 31-12-2003, the applicant was unable to attend and he may be given exemption from attendance. That application was opposed on behalf of the accused and learned Magistrate rejected the application and also dismissed the complaint in default. Being aggrieved by the dismissal of the case for want of prosecution, the Complainant has filed the present application seeking to quash the said order and to restore the criminal case which is filed before JMFC, Jawahar.

3. After perusal of the record I find that there is substance in the contention of the applicant that accused Respondent was almost continously absent for a long period and warrant was issued against him. On 26-9-2003 warrant was cancelled subject to payment of penalty. On 25-11-2003 his plea was recorded and matter was fixed for hearing on 29-12-2003. On 29-12-2003 Complainant was absent on the ground that he was out of station but that application was not allowed nor it was rejected and matter was posted to 1-1-2004. On 1-1-2004 application exhibit 28 was filed seeking exemption from attendance on the ground that because of death of a close relative on 31-12-2003, the Complainant could not

remain present. In my opinion the Complainant had given a very valid reason to remain absent on that day but the learned Magistrate rejected the application observing that he did not find it just and proper even to consider the contents of the application. According to him it was nothing but a careless act of the Complainant to pursue with the case. Taking into consideration the contents of application exhibit 28 and observations made by learned Magistrate I am constrained to note that the learned Magistrate did not apply his mind to the facts of the case and was very hasty and harsh in rejecting the application. By passing such order he dismissed the complaint in default and acquitted the accused. This order cannot be sustained and is liable to be set aside.

4. The appeal is allowed. The impugned order passed by the JMFC Jawahar on 1-1-2004 dismissing the complaint is hereby set aside. The Criminal case no. 30 of 2000 is hereby restored to the file of JMFC

Jawahar. After receipt of record, the learned Magistrate shall issue notice to the Respondent no. 1.

(J.H. Bhatia, J)